VIRGINIA SECTION

SPENDTHRIFT TRUSTS—NOT SUBJECT TO DEBTS OF BENEFICIARIES OR TO ALIENATION BY THEM.—§ 5157 of the Virginia Code of 1919 provides:

> "Estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof; but any such estate, not exceeding one hundred thousand dollars in actual value, may be holden or possessed in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them; but no such trust shall operate to the prejudice of any existing creditor of the creator of such trust."

It is to be noted that the last two clauses of this section are new, and that the effect of it is to permit spendthrift trusts to the extent stated. Section 2428 of the Virginia Code of 1887 provided that all trust estates were subject to the debts and charges of the beneficiaries, which would, of course, render invalid any provision made by the grantor or testator to exempt his gift from liability for the beneficiary's debts. This statute remained unchanged until the revision of the code of 1919.

Three cases have been discovered in Virginia involving the subject of spendthrift trusts. In *Garland* v. *Garland,*[1] the testator devised certain property to a trustee in trust for his brother during the latter's life, stipulating that "the profits of the estate are set apart for his (the brother's) use, under his superintendence", but that "neither the estate nor profits shall be bound for his past debts or for future debts and liabilities other than decent and comfortable support". The court construed the will as giving to the beneficiary only the mere right to receive so much of the profits as would furnish a decent and comfortable support, although, as strongly set forth in 7 VA. LAW REG. 796, the language of the will plainly gave the beneficiary the use of the profits of the estate under his superintendence. Upon this construction, the court held that the beneficiary had no title, legal or equitable, to the profits and that his right to a decent and comfortable support out of the profits was so qualified and limited as to fence out all his creditors except those who furnished him supplies for this support. It will thus be seen at once that the question of the validity of a provision that neither the estate nor profits should

[1] 87 Va. 758, 13 S. E. 478, 13 L. R. A. 212, 23 Am. St. Rep. 682.

be subject to the beneficiary's debts where the beneficiary has an equitable title to such estate or profits, was not passed upon.

This question, however, was considered in *Hutchinson* v. *Maxwell* [2]. In this case, the deed conveyed personal and real property to a trustee, allowed the beneficiary the use of the personal property and directed the trustee to pay the beneficiary from the income of the real estate such a sum as the trustee should deem necessary to the comfort and support of the beneficiary. It also provided that the property rights of the beneficiary thereunder should not be liable for his debts. The court held this provision to be void, considering that the property rights of the beneficiary (which it found to be an equitable title to the personalty and to so much of the income as was necessary to his support and maintenance) were subject to the demands of his creditors.

In its opinion, the court said in part: "the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, * * * whilst the English courts of chancery, and the American cases which follow them (even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner) seem to us to be sustained by the better reason, and in furtherance of a wise public policy."

The court discussed *Garland* v. *Garland, supra,* but distinguished it from the instant case by asserting that, inasmuch as the beneficiary in the Garland case had no absolute property in the profits for his creditors to subject, any discussion as to the validity of the provision against liability for debts was mere *obiter*. But a close inspection of the provisions of the instruments creating the trusts in both cases will show that the property rights of the beneficiary to the income of the real property in the Hutchinson case were much more restricted than those in the Garland case. Yet in the former, the court held that the beneficiary had rights in the profits that the creditors could obtain notwithstanding the provision against such liability, while in the latter his rights were considered too qualified and limited to be subject to his debts. It would seem, therefore, that the effort of the court to distinguish these cases was fruitless and that in reality the Hutchinson case must be considered as overruling the Garland case.

The holding in the Hutchinson case was followed in *Honaker* v. *Duff*.[3]

Thus it appears that prior to the revision of 1919 spendthrift trusts were not permitted in Virginia. As mentioned in the transcript from the opinion in the Hutchinson case, this is the rule in England and in some of the States of the Union.[4] The

[2] 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.
[3] 101 Va. 675, 44 S. E. 900.
[4] Brandon *v.* Robinson, 18 Ves. Jun. 429; Tillinghast *v.* Bradford, 5 R. I. 205.

majority of the States, however, permit spendthrift trusts.[5] By the change in the new code of 1919, Virginia has aligned herself with the majority of her sister States, where the trust estate does not exceed one hundred thousand dollars. She permits a kindly donor to provide the necessities of life for a careless and spendthrift donee without interference from his creditors or without alienation by him, but she endeavors to provide that the trust estate shall only be large enough to fulfill that purpose.

For a full discussion of spendthrift trusts, see NOTES, p. 213.

E. W.

CARRIERS—LIABILITY FOR LOSS WHERE NEGLIGENT DELAY CONCURS WITH ACT OF GOD.—Although a carrier is exempt from liability where an act of God is the proximate cause of the loss, yet if the negligence of the carrier in delaying the transportation concurs in and contributes to the loss, such negligence will be considered as the proximate cause for which the carrier will be held liable. The foregoing doctrine was recently laid down by the Virginia Court in *Merchants' and Miners' Transportation Company* v. *L. J. Upton & Company, Incorporated.*[1]

This is the first time that the much litigated question, whether the delay of the carrier is a proximate cause or merely a condition in such case, has been squarely presented to the Virginia Court. In holding that the negligent delay of the carrier was the cause, the court refused to follow and brushed aside a *dictum* laid down in *Herring* v. *Chesapeake, etc., R. Co.,*[2] which expressly stated that a delay in transportation was a remote cause or condition and that the act of God would relieve the carrier from liability.

There is a very sharp conflict between the authorities, the courts and textwriters being almost evenly divided on this question. For an extended discussion on this subject, see 3 VA. LAW REV. 458. Also see *Green-Wheeler Shoe Company* v. *Chicago, etc., R. Co.,* 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, where practically every case of any value bearing upon this question is cited.

LEASES—HOLDING OVER—RENEWALS AND EXTENSIONS—DISTINCTION.—There is a distinction which many courts recognize between a right of renewal and an option for the extension of a

[5] Broadway National Bank *v.* Adams, 133 Mass. 170, 43 Am. Rep. 504; Seymour *v.* McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544. In Nichols *v.* Eaton, 91 U. S. 716, the discussion of spendthrift trusts, though *dictum*, is very thorough.

[1] 103 S. E. 616.

[2] 101 Va. 778, 45 S. E. 322.